UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MEI KUM CHU, SAU KING CHUNG, and QUN XIANG LING, individually and on behalf of all others similarly situated, *Plaintiffs*, - against - CHINESE-AMERICAN PLANNING COUNCIL HOME ATTENDANT PROGRAM, INC., *Defendant*.	16 Civ. 03569 (KBF) (SN) [Rel. 15 Civ. 09605 (KBF) (SN)]

DEFENDANT CHINESE-AMERICAN PLANNING COUNCIL HOME ATTENDANT PROGRAM, INC.'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO COMPEL ARBITRATION OF THE MATTER AND STAY THE PROCEEDINGS PENDING ARBITRATION

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PRELIMINARY STATEMENT

The instant complaint is yet another attempt by Plaintiffs' attorneys to subvert the collective bargaining process by failing to exhaust the agreed-upon grievance and arbitration procedures. Plaintiffs Mei Kum Chu, Sau King Chung, and Qun Xiang Ling, home health care aides employed by Defendant, Chinese-American Planning Council Home Attendant Program, Inc. ("CPC"), filed, individually and on behalf of others, claims in state court alleging wage and hour issues expressly covered by the arbitration provisions of the governing collective bargaining agreement ("CBA") between Plaintiffs' bargaining representative, 1199 SEIU United Healthcare Workers East ("1199") and CPC.

Plaintiffs' attorneys are well aware that all of their claims must be arbitrated, given this Court's recent decision granting CPC's motion to compel arbitration of the matter and stay the action pending arbitration in the nearly identical case *Chan v. Chinese-American Planning Council Home Attendant Program, Inc.*, No. 15 Civ. 09605 (S.D.N.Y. Feb. 3, 2016). Yet they now attempt to evade the Court's ruling by seeking relief in state court. The seven counts in the instant complaint, which are virtually identical to those in the *Chan* case, involve: (1) minimum wage under New York Labor Law ("NYLL") § 652 *et seq*.; (2) overtime under NYLL § 650 *et seq*.; (3) spread-of-hours pay under NYLL §§ 190 *et seq*. and 650 *et seq*.; (4) wages due under NYLL § 191; (5) wage notification requirements under NYLL § 195; (6) breach of contract citing the New York Home Care Worker Wage Parity Act ("Wage Parity Act"), N.Y. Public Law § 3614-c; and (7) unjust enrichment citing the Wage Parity Act. [1]

The CBA covering Plaintiffs' terms and conditions of work explicitly provides that the wage and hour claims brought by Plaintiffs—including the NYLL and Wage Parity Act claims,

[1] The instant complaint omits the Fair Labor Standards Act ("FLSA") counts in a futile attempt to avoid federal question jurisdiction.

as well as breach of contract and unjust enrichment claims brought as a subterfuge for those same statutory claims—are subject exclusively to the grievance and arbitration procedures of the CBA. The express language of the CBA requires arbitration of claims involving "state and local wage-hour and wage parity statutes." 2015 Memorandum of Agreement ("2015 MOA"), Ex. 1, p. 9 ¶ 1.[2] Therefore, a stay of the proceedings pending arbitration is required. In fact, this Court recently held that this exact CBA required arbitration of a nearly identical complaint brought by the same Plaintiffs' attorneys. Moreover, here Plaintiffs cannot attempt to evade arbitration by claiming there is an issue of retroactivity, since the Complaint was filed after the signing of the 2015 MOA. *A fortiori*, in accordance with the mandate in *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009) and its progeny, as well as the Federal Arbitration Act ("FAA"), this Court must compel arbitration and stay these proceedings pending arbitration of these claims.[3] The strong public policy favoring arbitration, especially where, as here, a collective bargaining agreement expressly provides for arbitral resolution of the precise subject matter, requires exhaustion of the contractual grievance procedure.

STATEMENT OF FACTS

Defendant CPC is a not-for-profit corporation that provides home health care services to elderly and disabled residents of New York City. Compl. ¶¶ 13, 23. Three former employees of CPC brought this suit, seeking to represent a class of employees who worked as home health care aides between April 1, 2008 and June 1, 2015. *Id.* ¶¶ 5, 10, 16.

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[2] All references to exhibits refer to the exhibits annexed to the Affirmation of Kenneth Kirschner ("Kirschner Affirm.").

[3] CPC reserves its right to move to dismiss the Complaint, should this Court deny its motion to compel arbitration and stay the instant proceedings.

During the putative class period, Plaintiffs and putative class members did not reside with the elderly and disabled clients whom they assisted. *Id.* ¶ 28. They were, however, regularly assigned to work 24-hour shifts in a client's home. *Id.* ¶ 30. For those shifts, Plaintiffs were paid their hourly rate for 12 hours of work, plus an additional per diem amount of $16.95. *Id.* ¶¶ 34, 41, 48, 55. Plaintiffs claim that they were entitled to 24 hours of pay for each such 24-hour shift in a client's home because, they allege, they and the putative class members were required to provide their clients with assistance throughout the night and did not receive three hours of meal and other break time. *Id.* ¶¶ 31–33. As such, Plaintiffs claim that they were not paid the statutorily required minimum wage for up to 40 hours of work per week, were not paid the required overtime rate for work in excess of 40 hours, and were not paid a spread-of-hours premium for working more than 10 hours in a day, in violation of the NYLL and Wage Parity Act. *Id.* ¶¶ 36, 37, 43, 44, 49–51, 57–60, 68–86, 89–98. They also allege that they failed to receive pay statements that complied with the NYLL and its accompanying regulations.[4] *Id.* ¶¶ 61, 87, 88.

Plaintiffs fail to mention in their Complaint that they and all putative class members were or are members of a union, 1199, and are required to exhaust the grievance and arbitration procedures of the CBA for such claims. *See* Kirschner Affirm. ¶¶ 2, 3. CPC and 1199 have had a collective bargaining agreement in place for many years. *See id*. That CBA, as modified and extended by memoranda of agreement ("MOA"), governed the employment relationship between CPC and Plaintiffs and contained a grievance and arbitration procedure. *See id*.; 2010 CBA, Ex.

[4] In addition, Plaintiffs list whether CPC's "policy and practice of not paying Plaintiffs and the Class Members for all hours during which they were required to attend training meetings violates NYLL minimum wage and overtime provisions" as one of the questions of law or fact that are common to the class, but they do not make any direct allegation in their Complaint that Plaintiffs were required to attend trainings for which they were not paid. *Id.* ¶ 18h.

2; 2012 CBA, Ex. 3; 2014 MOA, Ex. 4; 2015 MOA, Ex. 1; April 2016 Side Letter, Ex. 5. In the 2015 MOA, 1199 and CPC expressly agreed to require that all wage and hour related claims be submitted to an exclusive grievance and arbitration process in an alternative dispute resolution procedure under the CBA.[5] *See* Kirschner Affirm. ¶ 3; 2015 MOA, Ex. 1, p. 9 ¶¶ 1, 2. Plaintiffs failed to do so. However, CPC initiated the grievance and arbitration procedure pursuant to the terms of the MOA, and such process has already commenced. *See* Kirschner Affirm. ¶ 4; Letter to Martin Scheinman, Ex. 6; Letter to Laureve Blackstone, Ex. 7.

PROCEDURAL BACKGROUND

Plaintiffs' attorneys are well aware that all of the claims in the Complaint must be arbitrated because they recently filed a nearly identical class and collective action complaint that has twice been held by this Court to be subject to the mandatory arbitration provisions of the CBA.[6] *Chan* Amended Compl., Ex. 8; *Chan v. Chinese-American Planning Council Home*

[5] The CBA also sets forth the very pay practices, hours, and other issues Plaintiffs complain about here, including their pay for 24-hour shifts, which specifically excludes eight hours of unpaid sleep time and three hours of unpaid duty-free meal time or break periods. 2015 MOA, Ex. 1, Article X (4). The 2014 MOA similarly set forth compensation for 24-hour shifts: "Employees assigned to clients designated as "Live-in" cases shall be paid a minimum of twelve (12) hours per day, plus a $16.95 per diem premium, and Paid Time Off shall be credited based on a twelve (12) hour workday." 2014 MOA, Ex. 4, Article X (6). The parties recently amended the 2015 MOA to modify overtime pay rates (calculated at one and one-half times the employee's regular rate of pay) by including weekend and mutual differentials in the regular rate of pay. April 2016 Side Letter, Ex. 5.

[6] On March 11, 2015, Plaintiffs' attorneys filed their first complaint against CPC in New York State Supreme Court. *Chan v. Chinese-American Planning Council Home Attendant Program, Inc.*, Index No. 650737/2015 (Sup. Ct. N.Y. Cty., filed Mar. 11, 2015). On June 5, 2015, CPC moved to dismiss the complaint, and, alternatively, to compel arbitration under the 2014 MOA, which was then in effect. On September 9, 2015, the state court denied CPC's motion and ordered CPC to answer the complaint, which it did on October 26, 2015. On November 9, 2015, Plaintiffs filed an amended complaint adding FLSA causes of action. CPC removed *Chan* to federal court, and, on December 15, 2015, moved to compel arbitration under the recently executed 2015 MOA. This Court held in favor of CPC and ordered the matter to be

Attendant Program, Inc., No. 15 Civ. 09605 (S.D.N.Y. Feb. 3, 2016) [hereinafter *Chan v. CPC I*], Ex. 9; *Chan v. Chinese-American Planning Council Home Attendant Program, Inc.*, No. 15 Civ. 09605 (S.D.N.Y. Apr. 8, 2016) [hereinafter *Chan v. CPC* II], Ex. 10. The *Chan* plaintiffs already purported to represent all current and former home care aides employed by CPC and alleged the same causes of action claimed here (in addition to FLSA minimum wage and overtime claims). *Id.* ¶¶ 21, 22, 62–91.

In fact, Plaintiffs' counsel's filing of the instant Complaint is only the latest in a series of desperate maneuvers intended to circumvent the requirement to arbitrate these wage and hour claims under the CBA. To wit, following CPC and 1199's execution of the 2015 MOA, Plaintiffs' attorneys filed unfair labor practice charges with the NLRB asserting violations of sections 8(a)(1) and 8(b)(1) of the National Labor Relations Act ("NLRA") and sought to enjoin ratification or implementation of the 2015 MOA, which the NLRB declined to do. *See* Kirschner Affirm. ¶ 6; NLRB Charge, Ex. 11. Then, just two days before 1199's scheduled vote to ratify the 2015 MOA, the *Chan* Plaintiffs filed a motion seeking to prevent such ratification as well as communication by CPC or 1199 to CPC employees about the 2015 MOA. This Court denied their motion. *Chan v. Chinese-American Planning Council Home Attendant Program, Inc.*, No. 15 Civ. 09605 (S.D.N.Y. Jan. 21, 2016), Ex. 12. On January 21, 2016, members of 1199 ratified the 2015 MOA. Notwithstanding Plaintiffs' counsel's measures, this Court ordered the parties to arbitrate the matter on February 3, 2016. *Chan v. CPC I*, Ex. 9. Unsatisfied, Plaintiffs next moved for the Court to reconsider its decision compelling arbitration. On April 8, 2016, this motion was also denied, and this Court held once again that the matter must be submitted to arbitration. *Chan v. CPC II*, Ex. 10. Four days later, Plaintiffs' attorneys filed the instant

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arbitrated. *Chan v. Chinese-American Planning Council Home Attendant Program, Inc.*, No. 15 Civ. 09605 (S.D.N.Y. Feb. 3, 2016), Ex. 9.

Complaint in state court. This latest attempt to circumvent CPC and 1199's agreed-upon resolution process must, like all of their other attempts, fail.

LEGAL STANDARDS

The CBA at issue here is governed by the FAA, which established a presumption of arbitrability. *See Md. Cas. Co. v. Realty Advisory Bd. on Labor Relations,* 107 F.3d 979, 982 (2d Cir. 1997). Section 3 of the FAA commands that, once "satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement," the court "*shall* on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3 (emphasis added). As such, a court must compel arbitration and stay the court proceedings when the parties have agreed to arbitrate the issues underlying the proceedings. *See* 9 U.S.C. § 1 *et seq.*; *McMahan Sec. Co. L.P. v. Forum Capital Mkts. L.P.*, 35 F.3d 82, 85-86 (2d Cir. 1994); *N.Y. Typographical Union No. 6 v. Bowne of N.Y. City, Inc.*, No. 90 CIV. 6422 (CSH), 1990 WL 170352, at *7 (S.D.N.Y. Oct. 31, 1990) (compelling arbitration between the parties in accordance with the arbitration provision in the CBA).

ARGUMENT

I. THIS COURT SHOULD COMPEL ARBITRATION OF THIS MATTER BECAUSE ALL OF PLAINTIFFS' CLAIMS ARE EXPRESSLY COVERED BY THE GRIEVANCE AND ARBITRATION PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

The FAA provides that "an agreement in writing to submit to arbitration . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Act "is a congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury*

Constr. Corp., 460 U.S. 1, 24 (1983). As the Second Circuit has declared, "it is difficult to overstate the strong federal policy in favor of arbitration, and it is a policy [the Second Circuit has] often and emphatically applied." *Arciniaga v. Gen. Motors Corp.*, 460 F.3d 231, 234 (2d Cir. 2006).

Given the strong federal policy in support of arbitration, the Supreme Court mandated that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24–25 (1983). There should be no doubts here. Plaintiffs, through their Union, agreed to submit all claims asserting NYLL and Wage Parity Act violations "in any manner" to "final and binding arbitration." 2015 MOA, Ex. 1, p. 9 ¶ 1. Each and every one of Plaintiffs' causes of action relate to the NYLL or the Wage Parity Act, including their NYLL minimum wage, overtime, spread-of-hours pay, wages due (including for allegedly unpaid trainings), and wage notification claims, as well as their breach of contract and unjust enrichment claims, which specifically invoke the Wage Parity Act. Compl. ¶¶ 68–98. This Court should therefore compel arbitration of these claims, as the CBA requires.

The CBA's grievance and arbitration procedure explicitly requires arbitration of each and every claim brought by Plaintiffs. 2015 MOA, Ex. 1, p. 9 ¶¶ 1, 2. The 2015 MOA modifying the CBA provides, in pertinent part: [7]

> 1. The parties agree a goal of this Agreement is to ensure compliance with all federal, state, and local wage hour law and wage parity statutes. Accordingly, to ensure the uniform administration and interpretation of this Agreement in connection with federal, state, and local wage-hour and wage parity statutes, *all claims brought by either the Union or Employees, asserting violations of or arising under the Fair Labor Standards Act ("FLSA"), New York Home Care Worker Wage Parity Law, or New York Labor Law (collectively, the "Covered Statutes"), in any manner, shall be subject exclusively, to the grievance and*

[7] The 2014 MOA also required Plaintiffs to arbitrate claims arising under state and federal law generally and claims pertaining to the Wage Parity Act specifically. 2014 MOA, Ex. 4 ¶ 22, 24. Thus, Plaintiffs' claims were arbitrable even under the prior agreement.

> *arbitration procedures described in this Article.* The statute of limitations to file a grievance concerning the Covered Statutes shall be consistent with the applicable statutory statute of limitations. All such claims if not resolved in the grievance procedure, including class grievances filed by the Union, or mediation as described below shall be submitted to final and binding arbitration before Martin F. Scheinman, Esq. The Arbitrator shall apply appropriate law and shall award all statutory remedies and penalties, including attorneys' fees, consistent with the FLSA and New York Labor Law in rendering decisions regarding disputes arising under this Article.
>
> 2. Whenever the parties are unable to resolve a grievance alleging a violation of any of the Covered Statutes, before the matter is submitted to arbitration, the dispute shall be submitted to mandatory mediation. The parties hereby designate Martin F. Scheinman, Esq. as Mediator for such disputes. Such mediation shall be requested no more than thirty (30) calendar days following exhaustion of the grievance procedure. Following submission of the dispute to mediation, the parties with the assistance of the Mediator shall establish such procedures as shall expeditiously advance the mediation process, including the scheduling of the exchange of relevant information, submission of position statements, and dates for mediation. In the absence of agreement, the Mediator shall determine such procedures. Once the matter has been submitted to mediation, the Employer shall be obligated to produce relevant documents as requested by the Union and any objections to production shall be ruled on by the Mediator. The fees of the Mediator shall be shared equally by the Union and the Employer.

Id. (emphasis added). Given that all of Plaintiffs' wage and hour claims relate to the Covered Statutes set forth in the CBA and are subsumed under the arbitration agreement, CPC initiated the grievance procedure pursuant to the CBA's terms and referred Plaintiffs' entire Complaint to arbitration and requests this Court to compel the parties to arbitrate. Kirschner Affirm. ¶ 4; Letter to Martin Scheinman, Ex. 6; Letter to Laureve Blackstone, Ex. 7.

CPC and 1199 bargained to arbitrate Plaintiffs' wage claims, and "[c]ourts generally may not interfere in this bargained-for exchange." *14 Penn Plaza*, 556 U.S. at 257. In *14 Penn Plaza*, for example, the union agreed that individual employment discrimination claims, including claims brought under the federal Age Discrimination in Employment Act, must be submitted to arbitration. *Id.* at 256. The U.S. Supreme Court held that the union had acted within its statutory authority to freely negotiate for that term on behalf of its members. *Id.* at

260. It also indicated that an agreement to arbitrate other statutory claims—including minimum-wage claims under the FLSA—would require arbitration even where the standard contract-based grievance procedure in a collective bargaining agreement would not. *See id.* at 263-64. The 2015 MOA includes a provision specifically requiring Plaintiffs to arbitrate such statutory claims.

This Court held that the CBA "expressly evinces the parties' intention to arbitrate the precise claims brought here, including all claims brought under the . . . New York Home Care Worker Wage Parity Law, and New York Labor Law." *See Chan v. CPC I*, Ex. 9. This Court should likewise compel arbitration of this case. This would allow both actions to be consolidated in arbitration before the designated mediator/arbitrator. It would also have the salutary effect of conserving judicial resources and avoiding inconsistent awards, since both actions bring the same allegations and likely involve many of the same putative class members.

II. THE 2015 MOA APPLIES TO PLAINTIFFS' CLAIMS

The fact that Plaintiffs' claims allegedly accrued prior to the 2015 MOA does not affect the arbitrability of such claims. Matters involving contract interpretation and arbitral procedure are for the arbitrator, not the court. *Duran v. J. Hass Grp., L.L.C.*, 531 F. App'x 146, 147 (2d Cir. 2013) (citing *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 453 (2003). As the Supreme Court held in *John Wiley & Sons, Inc. v. Livingston*, once the court has determined that parties must submit the subject matter of a dispute to arbitration, "procedural questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." 376 U.S. 543, 557 (1964). These procedural questions include claims of waiver, delay, or similar defenses to arbitrability. *Moses H. Cone Mem'l Hosp.* 460 U.S. at 24-25. And they include questions of time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84-85 (2002).

As explained in Point I, there should be no question that the subject matter of this dispute is arbitrable, as all of Plaintiffs' claims are encompassed in the 2015 MOA arbitration agreement, which requires arbitration of all NYLL and Wage Parity Law claims brought in any manner. *See supra* Point I; 2015 MOA, Ex. 1, p. 9 ¶ 1. Given that the subject matter of Plaintiffs' claims is undoubtedly subject to mandatory arbitration, this Court should allow the arbitrator to decide the procedural question of the CBA's application to the named Plaintiffs, as *John Wiley & Sons, Inc.* requires.

Where, as in the 2015 MOA, a broad arbitration clause requires the arbitrator to hear all claims, "a presumption of arbitrability attaches, and in the absence of any express provision excluding a particular grievance from arbitration, only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *Air Transp. Local 504 v. Meridian Mgmt. Corp.*, 12-CV-4954, 2013 WL 5507144, at *3 (E.D.N.Y. Sept. 30, 2013) (internal quotation omitted); *see also Salzano v. Lace Entm't Inc.*, No. 13-Civ-5600(LGS), 2014 WL 3583195, at *5 (S.D.N.Y. July 18, 2014). In fact, the Second Circuit has held that "the existence of a broad agreement to arbitrate creates a presumption of arbitrability which is only overcome if it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Smith/Enron Cogeneration Ltd.*, 198 F.3d at 99 (quoting *WorldCrisa Corp. v. Armstrong*, 129 F.3d 71, 74 (2d Cir. 1997)). "Doubts," the Court held, "should be resolved in favor of coverage." *Id.* The broad language of the 2015 MOA is unequivocal that "all claims" under "federal, state and local wage hour law and wage parity statutes . . . in any manner, shall be subject exclusively, to the grievance and arbitration procedures." 2015 MOA, Ex. 1, p. 9 ¶ 1. This is precisely the kind of broad arbitration provision entitled to a presumption of arbitrability.

Further, an agreement to arbitrate controls, regardless of whether a party's claims accrued prior to the execution of the agreement. *See Arrigo v. Blue Fish Commodities, Inc.*, 408 F. App'x 480, 481-82 (2d Cir. 2011). In *Arrigo*, the court held that the parties agreed to arbitrate all of an employee's unpaid overtime claims, including those accruing prior to the creation of the arbitration agreement. The Court noted that the arbitration agreement encompassed "all federal and state statutory claims" and emphasized the lack of any express temporal limitation on arbitrability. *Id.; see also Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 98 (2d Cir. 1999) (arbitration clause covering claims "arising under or relating to" the agreement encompassed claims pre-dating the arbitration clause); *Coenen v. R. W. Pressprich & Co.*, 453 F.2d 1209 (2d Cir. 1972) (claim predating an arbitration agreement fell within the agreement's scope in the absence of an express temporal limitation).

In *Duraku v. Tishman Speyer Props., Inc.*, 714 F. Supp. 2d 470, 474 (S.D.N.Y. 2010), the court held that the fact that the arbitration agreement did not expressly state that it applied retroactively to employees, who like plaintiffs, had already filed their claims in federal court, did not "relieve plaintiffs of their obligation to abide" by the alternative dispute resolution procedure. *See also Pontier v. U.H.O. Mgmt. Corp.*, No. 10 CIV. 8828 RMB, 2011 WL 1346801, at *3 (S.D.N.Y. Apr. 1, 2011) (same). In *Duraku*, plaintiffs filed a complaint in November 2009, asserting discrimination and retaliation claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., the New York State Human Rights Law, N.Y. Exec. Law § 290 *et seq*., and New York City Human Rights Law, N.Y.C. Admin. Code. § 8–101 *et seq*. *Duraku*, 714 F. Supp. 2d at 472. On February 17, 2010, the union representing the plaintiffs entered into a supplemental agreement to the CBA with defendant requiring discrimination claims to be submitted to mediation and arbitration. *Id.* The defendant subsequently moved pursuant to the FAA to dismiss the complaint or compel arbitration. *Id.* The Court granted the motion to compel arbitration and stayed the litigation pending arbitration, even though the new agreement did not expressly state it applied retroactively. *Id.* at 474–75. The Court emphasized that the arbitration agreement stated "*[w]henever* it is claimed that an employer has violated the no discrimination clause (including claims based in statute) of one of the CBAs, the matter *shall* be submitted to mediation." *Id.* (emphasis in original) The 2015 MOA contains nearly identical language: "*Whenever* the parties are unable to resolve a grievance alleging a violation of any of the Covered Statutes, before the matter is submitted to arbitration, the dispute *shall* be submitted to mandatory mediation." 2015 MOA, Ex. 1, p. 9 ¶ 1. Hence, such language must be viewed as requiring retroactive application.

Likewise, it makes no difference that Plaintiffs are no longer employed by CPC or members of 1199. In *Germosen v. ABM Indus. Corp.*, the court rejected the assertion that a CBA is not binding on a plaintiff merely because he is no longer a member of the union. No. 13-CV-1978 ER, 2014 WL 4211347, at *6 (S.D.N.Y. Aug. 26, 2014). Likewise, in *Pontier v. U.H.O. Management Corp.*, the court held that a supplemental agreement to a CBA containing an arbitration provision applied to a plaintiff whose employment with the defendant had ended years prior to the execution of the supplemental agreement. No. 10 CIV. 8828 RMB, 2011 WL 1346801, at *3 (S.D.N.Y. Apr. 1, 2011). As in *Duraku*, the court held that the fact that the supplemental agreement did not expressly state that it applied retroactively or to plaintiffs who were no longer employed by the defendant did not "relieve Plaintiff of his obligation to abide by the mediation and arbitration' provisions." *Id.* (quoting *Duraku*, 714 F.Supp.2d at 474). Thus, the employee was required to arbitrate his claims instead of litigating them in court. *Id.*

Here, the grievance and arbitration agreement in the CBA contains no express temporal limitation and is entitled to a presumption of arbitrability. This Court must therefore compel arbitration as required by the CBA.

III. THIS COURT SHOULD STAY THE MATTER PENDING ARBITRATION

Under Section 3 of the FAA, the court "*shall* on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3 (emphasis added); *see AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) ("§ 3 requires courts to stay litigation of arbitral claims pending arbitration of those claims 'in accordance with the terms of the agreement.'" (quoting 9 U.S.C. § 3)); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) ("[The FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." (emphasis in original)); *McMahan Sec. Co. L.P.*, 35 F.3d at 85-86 ("Under the Federal Arbitration Act, a district court must stay proceedings if satisfied that the parties have agreed in writing to arbitrate an issue or issues underlying the district court proceeding. The FAA leaves no discretion with the district court in the matter."); *Katz v. Cellco P'ship*, 794 F.3d 341, 347 (2d Cir. 2015) (same).

The CBA contains a grievance and arbitration procedure that explicitly covers each and every claim brought by Plaintiffs. Where, as here, all of the claims asserted in the Complaint are arbitrable, the Court should compel the parties to arbitrate and stay the proceedings pending the resolution of such arbitration.

CONCLUSION

For the foregoing reasons, CPC respectfully requests that this Court compel arbitration and stay the proceedings pending the arbitration covering all of Plaintiffs' claims and grant such other and further relief, including attorney's fees and costs, as this Court deems justice requires.

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Respectfully submitted,

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